

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 79 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME TAX

Versus

MRS.SHUSHILABEN PREMJI

Appearance:

MR MANISH R BHATT for Petitioner
SERVED for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 27/01/97

ORAL JUDGEMENT

(Per R.K. Abichandani, J.)

As directed by the High Court the following two questions were referred by the Income Tax Appellate Tribunal, Ahmedabad, for the opinion of this Court under section 256(2) of the Income Tax Act, 1961.

"1. Whether, on the facts and in the circumstances of the case, the finding of the Appellate Tribunal that the I.T.O. had no jurisdiction to levy the penalty under section 271(1)(c) and the jurisdiction was vested with the Inspecting Assistant Commissioner, is correct in law?

2. Whether, the Income tax Appellate Tribunal has been right in law in not accepting the contention of the Revenue that by virtue of the order of the commissioner of Income tax under section 273 (4) the order of the I.T.O. had merged and the Appellate Tribunal was therefore not competent to set aside the order of the ITO in levying the penalty?"

2 The matter pertains to imposition of penalty by the Income tax Officer under section 271(1)(c) of the said Act in respect of the Assessment Years 1969-70, 1970-71, 1972-73 and 1973-74. At the time when the original returns were filed in respect of these assessment years, the Inspecting Asst. Commissioner alone was empowered to impose penalty under section 271(1)(c) of the said Act. However, from 1st April 1976 the Income tax Officer was empowered to impose penalty exceeding Rs.1,000/- under the said provision.

3 The ITO had under section 147(a) of the said Act reopened assessments in respect of the said assessment years and imposed penalties of Rs.1,46,000, Rs.40,000, Rs.68,000 and Rs.1,71,000 under section 271(1)(c) of the Act in respect of Assessment Years 1969-70, 1970-71, 1972-73 and 1973-74 respectively. The assessee challenged these orders before the Commissioner of Income tax under section 273A (4) of the said Act and the CIT reduced the penalty to Rs.50,000, Rs.12,500, Rs.11,500 and Rs.14,000 respectively for these years.

4 The main question that arises for our consideration is whether the Income tax Officer could not have imposed these penalties under section 271(1)(c) of the said Act on the ground that he had no jurisdiction to do so at the time when the original returns of the income were filed and at that time Inspecting Asst.

Commissioner alone could have made such order or that the jurisdiction of the ITO should be examined with reference to his powers existing at the relevant time of issuing notices under section 271(1)(c) of the Act, when he could have made such orders by virtue of the deletion of sub-section (2) of Section 273A(4) of the Act with effect from 1.4.1976.

5 From the record it appears that the proceedings were initiated for levy of penalty under section 271(1)(c) against the assessee in respect of the Assessment Years 1969-70, 1970-71, 1972-73 on 17.5.1978 when notice was issued and in respect of the assessment year 1973-74 on 7.9.1976. The provision of section 271 (1) empowers the assessing officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the case of any proceedings under the Act to impose penalties prescribed therein. Clause (iii) of Section 271(1) as it stood prior to 1.4.1976 in context of concealment of particulars of income or furnishing inaccurate particulars provided for penalty as under:

"(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished."

6 It is obvious that as regards the quantum of penalty, the law as it prevailed at the relevant time of the date of default attracting the penalty. Penalty was imposed on account of the commission of a wrongful act and therefore it is the law operating on that date on which the wrongful act is committed which would determine the penalty. Prior to the amendment made by Taxation Laws (Amendment) Act, 1975, with effect from 1st April 1976 the relevant provision of subsection 2 of section 274 read as under:

"(2) Notwithstanding anything contained in clause (iii) of subsection 1 of section 271, if in a case falling under clause (c) of that subsection, the amount of income (as determined by the income tax officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the income tax officer shall refer the case to the Inspecting Asst. Commissioner who shall, for the purpose, have all the powers

conferred under this Chapter for the imposition of penalty."

By the amendment made by the Taxation Laws (Amendment) Act, 1975, subsection (2) of section 274 was deleted and the effect of the deletion was that the Income tax Officer became empowered after 1.4.1976 to impose penalty subject to certain conditions even in cases where the concealed income exceeded Rs.25,000/-. The order imposing the penalty had to be made only after the completion of the assessment. The crucial date, therefore for purposes of penalty, was the date of such completion. The jurisdiction of the authority to initiate the penalty proceedings would in our opinion depend upon the law which was in force in that regard on the date of the initiation of such proceedings. The competence of the Income tax Officer to exercise the power of imposition of penalty against the assessee under Section 271(1)(c) was to depend upon his finding as to the factum of concealment and the amount of income in respect of which such concealment took place. The question of initiation of penalty proceedings would arise only after the assessing officer arrives at such a finding. A penalty proceeding, therefore, can be initiated only after an assessment order has been made which finds such concealment or furnishing of inaccurate particulars. It is with reference to this point of time that the forum empowered to impose the penalty is to be ascertained. Whoever is authorised at that point of time can impose such penalty as was permissible under the law on the date on which the offence of concealment of income was committed by filing the offending return. The question of quantum of penalty therefore to be viewed in context of the date of the offending returns as regards the quantum of penalty while the forum empowered to impose the penalty is determined in context of the date of reaching the finding about concealment or furnishing of inaccurate particulars. We have based our view on the ratio of the decision of the Supreme Court in V. Chacko V. CIT, 203 ITR 885. Therefore, on the date of initiation of the penalty proceedings under section 271(1)(c) in May 1978 and September 1976 the Income tax Officer in the present case was not obliged to make a reference to the Inspecting Asst. Commissioner as was earlier required by the provisions of subsection (2) of section 274 and he himself was empowered to impose the penalty. In other words, the Income tax Officer was the competent authority to impose penalty as per the provisions of section 274 of the Act as they stood at the relevant time of initiation of the penalty proceedings

after 1.4.1976.

The record discloses that in respect of the Assessment Years 1969-70, 1970-71 and 1972-73 the assessment was reopened under section 147(a) of the said Act after the prior approval of the CIT and reassessment proceedings in respect of these three assessment years were completed on 17.5.1978 resulting in addition of Rs.1,45,206 to the income originally assessed for the Assessment Year 1969-70, Rs.39,403 to the income originally assessed for the Assessment Year 1970-71 and Rs.69,626 to the income originally assessed for the Assessment Year 1972-73. Since there was concealment of income on the part of the assessee, proceedings for levy of penalty under section 271(1)(c) were initiated against him in respect of these years by serving a notice on the assessee on 17.5.1978 under the provisions of section 274 read with section 271(1)(c) of the Act. As regards the Assessment Year 1973-74 the quantum of concealed income was worked out at Rs.1,70,174 and the addition on that count was made to the income of the assessee and the proceedings were earlier initiated for levy of penalty by issuing notice under section 274 read with section 271(1)(c) on 7.9.1976. Thus, in respect of all the assessment years proceedings for levy of penalty were initiated only after 1.4.1976, i.e. after the date from which subsection (2) of section 274 was deleted by the Taxation Laws (Amendment) Act, 1975. Therefore, all the proceedings for imposition of penalty which were initiated after 1.4.1976 were to be governed by the provisions of section 274 as amended by the Taxation Laws (Amendment) Act, 1975, as a result of which subsection (2) of section 274 was omitted. Therefore, in our opinion, the income tax officer was empowered to impose the impugned penalties on the assessee. This is not a case where any reference was pending on 1.4.1976 under subsection (2) of section 274 before the Inspecting Asst. Commissioner or where the proceedings were initiated prior to 1.4.1976. Therefore, the ratio of the decision of the Supreme Court in C.I.T. v. Dhadi Sahu reported in 199 ITR 610 is not attracted in this case. In that case, the Supreme Court was considering a matter where the assessee failed to disclose his income falling to the share of his minor children, the house property for the assessment years 1968-69 and 1969-70 and where the income tax officer made the assessment orders on 28.2.1970 initiating the penalty proceedings under section 271(1)(c) of the Act. Since the penalty to be imposed would exceed Rs.1,000, the ITO had referred the case to the Inspecting Asst. Commissioner under section 274(2), as it then stood. Pending the proceedings, the said

provision of section 274(2) was amended with effect from 1st April 1971 as a result of which only cases of penalty where the income concealed was Rs.25,000 or more were to be referred to the Inspecting Asst. Commissioner. In the cases which were referred to the Inspecting Asst. Commissioner the concealed income was less than Rs.25,000/-. The Inspecting Asst. Commissioner on February 15, 1973, made orders imposing penalty in respect of Assessment Years 1968-69 and 1969-70. The Appellate Tribunal cancelled the penalty holding that the Inspecting Asst. Commissioner had lost jurisdiction in view of the amendment of 274(2) and that view was affirmed by the High Court. The Supreme Court held that when reference was made to the Inspecting Asst. Commissioner he had validly acquired the jurisdiction to pass the orders imposing penalty and the amendment of section 274(2) did not make any provision that references which were pending should be returned to the ITO if the concealed income was less than Rs.25,000. It was held that if the reference was made before 1st April 1971, it would be governed by section 274(2) as it stood before that date and the Inspecting Asst. Commissioner would have jurisdiction to pass the order of penalty. The Supreme Court approved the ratio of the decisions of this Court in the case of C.I.T. v. Royal Motor Car Company reported in 107 ITR 753 and in C.I.T. v. Balabhai & Co. reported in 127 ITR 301.

7 The present case is not a case where any Reference was pending before the Inspecting Asst. Commissioner by virtue of the provisions of subsection (2) of section 274 as it stood prior to its deletion from section 274 of the said Act. Since the proceedings for imposition of penalty were initiated in May 1978 in respect of the reassessment done for the Assessment Years 1969-70, 1970-71 and 1972-73 and on 7.9.1976 in respect of the Assessment Year 1973-74, no reference was required to be made by the ITO to the Inspecting Asst. Commissioner in view of the deletion of sub-section (2) of section 274 from 1.4.1976. In this view of the matter, the orders made by the ITO in imposing the penalties on the assessee in respect of these assessment years cannot be said to be made without jurisdiction. The provisions of Section 271 were amended from 1st April 1989 by the Direct Tax Laws (Amendment) Act, 1989. The orders imposing penalties were all made on 18th May 1978. Therefore, as per the provisions of Section 271(1)(c) (iii) proviso, if in a case falling under clause (c), the amount of income (as determined by the assessing officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been

furnished exceeded Rs.25,000, the Income tax Officer could not have issued any direction for payment by way of penalty without the previous approval of the Inspecting Asst. Commissioner. In view of that provision, the requisite previous approval of the IACJR was obtained by the ITO before passing the orders of penalties as mentioned in those orders. Therefore, the ITO had acted in lawful exercise of his jurisdiction in imposing the penalties in respect of the said assessment years. In this view of the matter, the Tribunal was not right in holding that the ITO had no jurisdiction to levy the penalty under section 271(1)(c) and that it was vested with Inspecting Asst. Commissioner. Question no.1 is therefore answered in the negative in favour of the Revenue and against the assessee.

8 As regards the question no.2 the Tribunal has held that there is no question of application of doctrine of merger on the ground that the orders of the income tax officer were without jurisdiction. The penalty was reduced by the CIT on an application made to him under section 273A(4) of the said Act. The power to reduce or waive the amount of penalty can be exercised by the Commissioner under subsection (4) of section 273A without prejudice to the other powers conferred on him by the provisions of the Act. While hearing such application the Commissioner was not exercising any appellate power against the order of ITO and therefore, strictly speaking, the doctrine of merger will not be attracted. The amount of penalty which was imposed by the ITO will, however, stand substituted by the amount of reduced penalty under the orders of the Commissioner of Income tax made under section 273A (4) of the said Act. Question no.2 is answered accordingly. The reference stands disposed of with no order as to costs.

(mohd)